

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

E.P.S.S., INC. AND	)	
BIL DARBY	)	
_____	)	CASE NO.
	)	92-017
ALLEGED FAILURE TO COMPLY WITH	)	
COMMISSION REGULATIONS	)	

O R D E R

On January 13, 1992, an Order to show cause was issued by the Commission against E.P.S.S., Inc. ("E.P.S.S."). The Order was issued on the basis of a utility inspection report filed December 18, 1991 by a utility investigator employed by the Commission. The report charges E.P.S.S. with 14 violations of 807 KAR 5:071, Section 7(1). The Order directed E.P.S.S. to appear before the Commission and show cause why it should not be penalized pursuant to KRS 278.990 for its failure to comply with Commission regulations. The Order further directed E.P.S.S. to submit a written response to the charges made in the inspection report.

On January 30, 1992, Harold Tenant, a customer of E.P.S.S., was granted limited intervention in the proceeding.

On February 5, 1992, Bil Darby, as the sole shareholder and president of E.P.S.S., was made a party to the proceeding and directed to appear before the Commission to show cause why he too should not be subject to the penalties provided in KRS 278.990.

On January 28, 1992, Bil Darby, as the sole shareholder of E.P.S.S., filed a response to the Order. In the response, Bil Darby stated that due to the financial condition of the corporation he could not provide maintenance or management for its facilities. In a separate statement attached to the response, Bil Darby listed the actions taken to correct the violations charged in the utility investigation report.

A hearing was held before the Commission on February 5, 1992 at which Bil Darby appeared on behalf of himself and E.P.S.S. Neither Bil Darby nor the corporation was represented by counsel. Although no other party appeared at the hearing, the Executive Park Neighborhood Association ("Neighborhood Association") appeared and made a brief statement for the record.

#### FINDINGS OF FACT

E.P.S.S. owns, controls, and operates facilities used for the treatment of sewage for the public. The facilities are located in the Executive Park Subdivision in Madison County. Madison County does not contain a first class city and the E.P.S.S. sewage treatment plant is not subject to regulation by a metropolitan sewer district.

E.P.S.S. is a Kentucky corporation. Its sole shareholder and president is Bil Darby, who acquired all the stock of the corporation in February 1988. At that time, the name of the corporation was E.P.S. Sanitation, Inc. and was later changed to E.P.S.S.

E.P.S.S. operated its sewer plant until October 1, 1991, when the operation was taken over by Bill Williams. At that time, Bill

Williams was negotiating with Bil Darby to purchase the plant. Bill Williams operated the sewage treatment plant until December 31, 1991, when he and Bil Darby terminated their negotiations. E.P.S.S. then resumed operating the plant and continued to operate it until February 13, 1992, when Warner Brougham was appointed Special Receiver by the Franklin Circuit Court to assume possession, operation, and control of the plant. It is anticipated that ownership of the sewage treatment plant will eventually be transferred, most likely to the Neighborhood Association, an association formed by residents of the Executive Park Subdivision, or to some other similar entity. In this respect, it is noteworthy that Bil Darby did not object to the appointment of the receiver and apparently has no intention of personally resuming operation of the plant. Bil Darby is also the sole shareholder of M.A.V.I.S.S., Inc., another sewer public utility in Madison County. That utility is also in financial trouble and has been cited for failure to operate in compliance with Commission regulations.<sup>1</sup>

On July 18, 1991, E.P.S.S. petitioned the U. S. Bankruptcy Court for relief from its debts under Chapter 7 of Title 11 of the U. S. Bankruptcy statutes.<sup>2</sup> Although the petition protected E.P.S.S. from its creditors on September 17, 1991, the bankruptcy

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<sup>1</sup> Case No. 92-016, In the Matter of M.A.V.I.S.S., Inc. and Bil Darby, Alleged Failure to Comply with Commission Regulations.

<sup>2</sup> In Re: E.P.S.S., Inc., No. 91-01454 (Bankr. E.D.Ky.).

court ordered that the Commission's authority to regulate the utility's operations continued.

E.P.S.S. has 81 residential customers, all of whom reside in the Executive Park Subdivision. It has no commercial or industrial customers. Its current rate for sewer service is \$16.04 per month. The rate was in effect in 1988, when Bil Darby acquired the facilities. Although E.P.S.S. has experienced financial problems related to the operation of the sewage facility ever since Bil Darby acquired the stock in 1988, E.P.S.S. did not apply for a rate increase until March 1991. Before that rate proceeding could be completed, however, E.P.S.S. filed its petition declaring bankruptcy in July 1991 and discontinued the rate case.

The inspection out of which this proceeding arose was conducted by a utility investigator on December 16, 1991. The investigator had previously inspected the plant on 10 or 12 other occasions. From the condition of the plant, it was apparent to the investigator that it was not being properly maintained. The investigator found 14 conditions which he cited as violations. In a follow-up inspection made on February 10, 1992, the investigator found little change in the system although some minor improvements had been made.

The plant has also been inspected by environmental inspectors employed by the Natural Resources and Environmental Protection Cabinet. Those inspectors have found the plant to be in violation of their cabinet's regulations and have cited E.P.S.S. for those violations.

E.P.S.S. does not deny the violations. On the contrary, E.P.S.S. admits that the plant has been in poor condition ever since the corporation was acquired by Bil Darby. E.P.S.S. states that due to the lack of funds, it has not been able to improve the plant or bring it into compliance. E.P.S.S.'s financial problems are due to a combination of low rates and the failure of a significant number of customers to pay their sewage bills on time or, in some cases, to pay them at all. Of its 81 customers, 28 are delinquent in the payment of their bills.

#### CONCLUSIONS OF LAW

E.P.S.S. is a public utility subject to the jurisdiction of this Commission. By reason of its failure to properly maintain the plant, E.P.S.S. has violated the provisions of Commission Regulation 807 KAR 5:071, Section 7.

KRS 278.990(1) provides that any utility or any officer, agent, or employee of a utility who "willfully violates" any provision of KRS Chapter 278, or any regulation promulgated under that chapter, shall be subject to a penalty of up to \$2,500. A willful violation is a violation that is committed intentionally, not accidentally nor involuntarily. Muncie v. Commonwealth, 97 S.W.2d 606, 609 265 Ky. 730, 736 (1936). In the matter of Mike Little Gas Company, Inc., Case No. 91-202,<sup>3</sup> this Commission held that a willful violation occurs when an officer, agent, or

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<sup>3</sup> Case No. 91-202, Mike Little Gas Company, Inc., Alleged Violation of KRS 278.160.

employee of a utility knowingly violates any provision of KRS Chapter 278, or any regulation promulgated under that chapter.

Bil Darby was aware at all times that the sewage treatment plant owned by E.P.S.S. was not being operated in compliance with Commission regulations. As president of the corporation and the manager of the facility, Bil Darby had a duty to take whatever action was appropriate to bring the system into compliance. His failure to do so was a knowing violation of the regulations for which the Commission may assess a penalty against both the utility and Bil Darby.

Under the circumstances, a penalty of \$100 assessed against E.P.S.S. and a penalty of \$100 assessed against Bil Darby would be appropriate. The penalties should be suspended on condition that E.P.S.S. and Bil Darby, within 120 days, either bring the plant into compliance or transfer ownership of the plant to an entity capable of bringing the plant into compliance. If after the expiration of the 120-day period the conditions of the suspension have not been complied with and if E.P.S.S. cannot provide sufficient reasons to extend the suspension period, the penalties should be enforced.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. E.P.S.S. and Bil Darby are hereby determined to be in willful violation of 807 KAR 5:071, Section 7(1), for failing to properly maintain the sewage treatment plant owned by E.P.S.S.

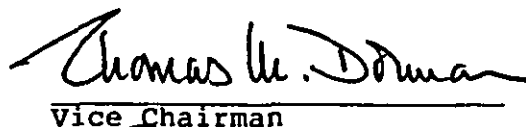
2. For such violation, E.P.S.S. and Bil Darby are each hereby assessed a penalty of \$100.

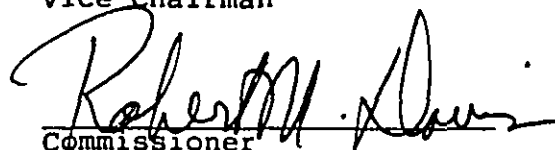
3. The penalty shall be suspended on condition that E.P.S.S. and Bil Darby within 120 days bring the plant into compliance or transfer ownership of the plant to a person with the financial, managerial, and technical ability to provide reasonable utility service. If at the expiration of the 120-day period the conditions of suspension have not been complied with and E.P.S.S. cannot provide sufficient reasons to extend the suspension period, the penalty shall be enforced.

Done at Frankfort, Kentucky, this 29th day of May, 1992.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director, Acting